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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

8 STEPHANIE J. MARSHALL,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE, Commissioner of Social
12 Security,

12 Respondent.

Case No. C11-1236-JCC-BAT

**REPORT AND
RECOMMENDATION**

13 Stephanie J. Marshall seeks review of the denial of her Supplemental Security Income
14 and Disability Insurance Benefits applications. She contends the ALJ improperly (1) rejected the
15 opinions of examining doctor Robert Parker, Ph.D., (2) discounted the testimony of her husband;
16 (3) assessed her credibility; (4) assessed her residual functional capacity; and (5) failed to
17 adequately develop the record. Dkt. 12 at 1. As discussed below, the Court recommends the
18 case be **REVERSED** and **REMANDED** for further proceedings.

19 **BACKGROUND**

20 Ms. Marshall is currently 48 years old, has completed the 12th grade, and has worked
21 manual labor jobs at various companies for the last 15 years.¹ She last worked on May 31, 2008.
22 Tr. 92. On December 3, 2008, she filed applications for disability insurance benefits, and
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¹ Tr. 92-93, 95.

1 supplemental security income. Tr. 11. Her applications were denied initially and on
2 reconsideration. At the hearing the ALJ conducted on June 29, 2010, Ms. Marshall amended her
3 onset date from January 1, 2003, to December 3, 2008. *Id.* On July 29, 2010, the ALJ issued a
4 decision finding Ms. Marshall not disabled. As the Appeals Council denied Ms. Marshall's
5 request for review, the ALJ's decision is the Commissioner's final decision.

6 THE ALJ'S DECISION

7 Utilizing the five-step disability evaluation process,² the ALJ made the following
8 findings:

9 **Step one:** Ms. Marshall had not worked since December 3, 2008.

10 **Step two:** Ms. Marshall had the following severe impairments: a depressive disorder and
substance abuse disorder.

11 **Step three:** These impairments did not meet or equal the requirements of a listed
12 impairment.³

13 **Residual functional capacity:** Ms. Marshall could perform a full range of work at all
14 exertional levels but with the following non-exertional limitations: she could adequately
15 perform the mental activities generally required by competitive, remunerative, unskilled
16 work as follows: understand, remember, and carry out simple 2 to 3 step instructions
17 required of jobs classified at a level of SVP 1 and 2 or unskilled work, and also some jobs
18 at the SVP 3 and 4 semi-skilled level of work. She had the average ability to perform
sustained work activities (maintaining attention, concentration, persistence and pace) in
an ordinary work setting on a regular and continuous basis (8 hours a day, 5 days a week,
or equivalent work schedule) within the customary tolerances of employers' rules
regarding sick leave and absences. She could make judgments on simple work-related
decisions necessary to perform work at the unskilled level; respond appropriately to
supervision and co-workers; and deal with changes all within a stable work environment.

19 **Step four:** Ms. Marshall was capable of performing past relevant work as a survey
20 worker.

21 **Step five:** Alternatively, as there are other jobs that Ms. Marshall could perform, Ms.
22 Marshall is not disabled.

23 ² 20 C.F.R. §§ 404.1520, 416.920.

³ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 Tr. 13-19.

2 DISCUSSION

3 A. The ALJ's evaluation of Dr. Robert Parker, Ph.D.

4 Ms. Marshall contends the ALJ failed to give sufficient reasons to reject the opinions of
5 examining doctor Robert Parker, Ph.D., rendered in a Washington State Department of Social
6 and Health Services (DSHS) psychological evaluation he performed on November 17, 2008.
7 Dkt. 12 at 2. In this evaluation, Dr. Parker diagnosed Ms. Marshall with "Bipolar Type II
8 depressed w/ psychotic features, PTSD, Cognitive disorder NOS; alcohol dependence in
9 sustained remission." Tr. 341. He opined the severity of Ms. Marshall's depressed mood and
10 global illness was severe, and that her expression of anger, social withdrawal, verbal expression
11 of fear or anxiety, and thought disorder were marked. *Id.* He further opined Ms. Marshall had
12 marked limitations in her ability to learn new tasks, perform routine tasks, interact appropriately
13 in the public contacts, and to control her physical movements and maintain appropriate behavior.
14 Tr. 342. He opined she had severe limitations in her ability to relate appropriately with co-
15 workers and supervisors and to respond to and tolerate the normal pressures of a work setting.
16 *Id.*

17 The ALJ rejected Dr. Parker's opinions on the grounds the doctor used a "check-box
18 form," the "mental status report[] indicated that she was functional," and because in reports
19 generated before Dr. Parker's evaluation, Ms. Marshall reported improved functioning and a
20 sense of well being when she was clean and sober. Tr. 17. The ALJ noted while the reports
21 generated before Dr. Parker's evaluation pertained to Ms. Marshall's condition before the alleged
22 onset date and thus were not particularly relevant, they nonetheless showed "the claimant was
23 able to function pretty well when she remained abstinent from substance abuse." *Id.*

1 These are not sufficient reasons to reject Dr. Parker's opinions. The use of a "check-box
2 form," alone, is not grounds to reject the doctor's opinions. Medical opinions contained in
3 check-box forms are a common feature of social security disability cases. Sometimes the
4 Commissioner relies on opinions in "check-box forms" to reject a claimant's application, and
5 sometimes not. As such, simply noting a doctor used a "check-box form" provides no measure
6 of what weight the opinion contained therein should be given. Certainly, in some cases an ALJ
7 may properly discount a doctor's opinion where the doctor's opinions are brief, conclusory, and
8 inadequately supported by medical records. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
9 2005). But as the ALJ neither discussed nor relied upon these reasons in rejecting Dr. Parker's
10 opinions, neither can the Court. *Bray v. Comm'r of Soc. Sec Admin.*, 554 F.3d 1219, 1225 (9th
11 Cir. 1995).

12 The importance of focusing on the grounds relied upon by the ALJ in affirming or
13 reversing the ALJ cannot be overemphasized. It is not for the Court to interpose reasons not
14 mentioned or relied upon by the ALJ. For this reason, the Court cannot accept the
15 Commissioner's argument the ALJ properly rejected Dr. Parker's opinions on the grounds they
16 were contradicted by the opinions of Dr. Wayne Dees, Psy.D., who also examined Ms. Marshall.
17 Dkt. 14 at 10. The ALJ made no mention that this was a ground upon which he was relying to
18 reject Dr. Parker's opinions. The Commissioner's argument is thus an improper post-hoc
19 rationalization the Court cannot rely on.

20 The ALJ also erred in rejecting Dr. Parker's opinions on the grounds the "mental status
21 report[] indicated that she was functional." An ALJ may reject an uncontradicted examining
22 doctor's opinion for "clear and convincing reasons" or "specific or legitimate reasons" where
23 contradicted. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). An ALJ does this by setting

1 out a detailed and thorough summary of the facts and conflicting evidence, stating her
2 interpretation of the facts and evidence, and making findings. *Magallanes v. Bowen*, 881 F.2d
3 747, 751 (9th Cir. 1989). The ALJ must do more than offer her conclusions; she must also
4 explain why her interpretation, rather than the doctor's interpretation, is correct. *Orn v. Astrue*,
5 495 F.3d 625, 632 (9th Cir. 2007) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
6 1988)).

7 Here, the ALJ gave no explanation as to what "functional" meant or how he arrived at
8 that finding. This failure is problematic as Dr. Parker's mental status examination showed Ms.
9 Marshall had functional limitations. In the mental status examination, Dr. Parker opined Ms.
10 Marshall's mood was depressed, angry, and irritable; that her sleep was erratic; that she had
11 decreased appetite, lethargic motor skills, episodic anger and irritability that was moderate in
12 severity; that she had passing thoughts of suicide, auditory hallucinations, poor fund of
13 knowledge, poor ability to perform 3-step commands, and poor delayed recall. The doctor
14 further opined Ms. Marshall had logical, appropriate and responsive thoughts, could identify two
15 objects, normal language, judgment, orientation, attention and immediate recall. Tr. 345. Dr.
16 Parker also administered a "Trails A and B" test which the doctor indicated suggested cognitive
17 impairment, and the need for IQ testing. Tr. 347. The doctor's mental status examination thus
18 indicates Ms. Marshall functioning was not normal. Given these opinions and test results, and
19 the ALJ's failure to explain why the examination showed Ms. Marshall was "functional," or
20 what "functional" meant, the Court concludes the ALJ erred.

21 And finally, the ALJ erred in rejecting Dr. Parker's opinions on the grounds that "the
22 claimant was able to function pretty well when she remained abstinent from substance abuse."
23 Tr. 17. First, as the ALJ noted, the reports that indicated Ms. Marshall functioned pretty well

1 when not using drugs are “not particularly relevant to the issues present in this case” as they
2 pertain to Ms. Marshall’s condition before the alleged onset date. Tr. 17. And second, the ALJ’s
3 rejection of Dr. Parker’s opinions on the grounds that substance abuse was a major consideration
4 required the ALJ to utilize the Commissioner’s regulations and the two-step analysis as set forth
5 by the law of this Circuit, something the ALJ failed to do here.

6 Under the law of this Circuit, an ALJ must apply a specific two-step inquiry in analyzing
7 substance abuse in a disability determination. *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir.
8 2001). In *Bustamante*, the ALJ found Bustamante’s limitations were a result of alcohol abuse,
9 that alcohol abuse was his primary impairment, and that it did “not reach a disabling level of
10 severity.” *Id.* at 952. The Court of Appeals reversed, holding “[t]he ALJ should have proceeded
11 with the five-step inquiry without attempting to determine the impact of Bustamante’s
12 alcoholism on his other mental impairments. If, and only if, the ALJ found Bustamante was
13 disabled under the five-step inquiry, should the ALJ have evaluated whether Bustamante would
14 still be disabled if he stopped using alcohol.” *Id.* at 955. The Court of Appeals remanded, “with
15 instructions that the ALJ proceed with step three (and four and five, if necessary) of the disability
16 determination without attempting to separate out the impact of Bustamante’s alcohol abuse.” *Id.*
17 at 956. The Court instructed the ALJ to consider whether “alcohol is a contributing factor
18 material to” disability only if the ALJ found Bustamante disabled. *Id.*

19 The law of the Circuit tracks the Commissioner’s own regulations. Under the
20 Commissioner’s regulations, the ALJ must follow a specific analysis that incorporates the five-
21 step sequential evaluation. 20 C.F.R. §§ 404.1535(a), 416.935(a). The ALJ first must conduct
22 the five-step inquiry without attempting to determine the impact of a substance abuse disorder.
23 If the ALJ finds that the claimant is not disabled under the five-step inquiry, the claimant is not

1 entitled to benefits, and there is no need to proceed with further analysis. *Id.* If the ALJ finds
2 the claimant disabled, and there is evidence of substance abuse, the ALJ should proceed under
3 the sequential evaluation and §§ 404.1535 or 416.935 to determine if the claimant would still be
4 disabled absent the substance abuse. If found disabled with the effects of substance abuse, the
5 claimant has the burden in steps one through four of the second sequential evaluation process to
6 prove drug or alcohol abuse is not a contributing factor material to his disability. *Parra v.*
7 *Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).

8 In this case, rather than conducting the five-step inquiry **without** determining the impact
9 of substance abuse, the ALJ considered the impact of substance abuse in rejecting Dr. Parker's
10 opinions, and in concluding Ms. Marshall was not disabled at steps four and five. In other
11 words, rather than conducting the required specific two-step inquiry, the ALJ erred by
12 improperly lumping the impact of substance abuse into a single inquiry.

13 In sum, the Court concludes that as none of the reasons the ALJ gave to reject Dr.
14 Parker's opinions are supported by substantial evidence, the ALJ erred. The Court further
15 concludes this error was not harmless. The ALJ noted Dr. Parker's opinions were among the
16 opinions which "suggested that the claimant was disabled." Tr. 17. Consequently, the Court
17 cannot confidently conclude that no reasonable ALJ, when not making the same error as the
18 ALJ, could have reached a different disability determination and the matter should thus be
19 remanded for further proceedings. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56
20 (9th Cir. 2006).

21 **B. The ALJ's assessment of Ms. Marshall's credibility**

22 Ms. Marshall argues the ALJ erred in finding her not fully credible. Dkt. 12 at 16. The
23 ALJ did not find that Ms. Marshall was malingering. Thus, the ALJ was required to provide

1 clear and convincing reasons to reject her testimony. *See Vertigan v. Halter*, 260 F.3d 1044,
2 1049 (9th Cir. 2001). An ALJ does this by making specific findings supported by substantial
3 evidence. “General findings are insufficient; rather, the ALJ must identify what testimony is not
4 credible and what evidence undermines the claimant’s complaints.” *Lester v. Chater*, 81 F.3d
5 821, 834 (9th Cir. 1996).

6 In this case, the ALJ noted:

7 the claimant reported that she seldom leaves her room and remains
8 in bed (exhibit 13F:27, 32), which is untrue. The claimant testified
9 that she went to church frequently, sometimes performing as an
10 usher showing people to their seats, and other tasks. She attended
11 weekly bible study; she told Dr. Dees that she went to church twice
a week . . . and other providers that she might attend aerobic
classes. . she does some household chores such as meals and runs
errands . . . and she went camping and swimming with other
church people.

12 Tr. 18. While an ALJ may not penalize a claimant for attempting to live a normal life in the face
13 of his limitations, the ALJ may rely on contradictions between a claimant’s reported activities
14 and her asserted limitations in assessing a claimant’s credibility. *Morgan v. Comm’r of Soc. Sec.*
15 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). Here, the ALJ properly relied on the conflict
16 between Ms. Marshall’s testimony she was essentially bedridden, and other evidence that
17 showed she was not, to discount her testimony.

18 The ALJ also found Ms. Marshall not fully credible on the grounds she “shoplifted from
19 stores when money was tight” and that in order to obtain a bed at a shelter, she lied that her
20 husband had drugs problems. Tr. 18. An ALJ may consider “ordinary techniques of credibility
21 evaluation” including the claimant’s reputation for truthfulness. *Smolen v. Chater*, 80 F.3d 1273,
22 1283-84 (9th Cir. 1996). The ALJ thus properly discounted Ms. Marshall’s credibility based on
23 her admission she lied to gain a shelter bed and that she stole from stores. Ms. Marshall argues

1 that lying once to get shelter-bed is not probative of her reputation for truthfulness. However,
2 coupled with her admission that she also shoplifted, the Court cannot say the ALJ's finding was
3 unreasonable or unsupported. To be sure, the ALJ's finding is debatable but when the evidence
4 is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
5 must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

6 Accordingly, as the ALJ's evaluation of Ms. Marshall's testimony is supported by
7 substantial evidence, the Court will not disturb the ALJ's finding that Ms. Marshall's testimony
8 is not fully credible.

9 **C. The ALJ's evaluation of Melvin Marshall's testimony**

10 Ms. Marshall contends "the ALJ purported to accept Mr. Marshall's testimony" but then
11 erred by failing "to account for the limitations identified by Mr. Marshall in his residual
12 functional capacity [RFC] finding." Dkt. 12 at 10. Lay testimony as to a claimant's symptoms is
13 competent evidence that the ALJ must take into account, unless the ALJ expressly determines to
14 disregard such testimony and gives specific reasons germane to each witness for doing so. *Lewis*
15 *v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d at
16 1053. Here, the ALJ found Mr. Marshall:

17 Reported in May 2010 that she had some sleep disturbance, and
18 she spent much of the time lying around and doing nothing. She
19 was often irritable. He said they attended church twice a week . . .
20 Those statements are consistent with the claimant's self-reports.
21 At the hearing, the claimant's husband testified that the claimant
22 slept all day long, a statement that supported the claimant's
23 testimony. He added, however, that she watched TV all night
long. There were issues of substance abuse; he stated that she was
irritable, had mood swings, and was threatening at times. He said
that he helped with household tasks (his wife did nothing). While
that may be so, her inactivity is not due to any physical or mental
impairment supported by the record. The claimant's husband said
that she is inconsistent in her reporting to her doctors, and that she

1 remained social with church activities. All in all, Mr. Marshall's
2 reports are fairly credible.

3 Tr. 18. The Commissioner contends that "the ALJ's interpretation of Mr. Marshall's testimony
4 was rational" and is thus entitled to deference. The Court cannot accept this contention because
5 it is unclear how the ALJ parsed Mr. Marshall's testimony, and thus not possible to conclude the
6 ALJ's interpretation was rational. The ALJ found Mr. Marshall's testimony "fairly credible" but
7 failed to detail whether all of the testimony was "fairly credible" or just partially "fairly
8 credible." In discussing Mr. Marshall's testimony, the ALJ noted Ms. Marshall's inactivity "is
9 not due to any physical or mental impairment supported by the record." This suggests the ALJ
10 was rejecting Mr. Marshall's testimony about Ms. Marshall's "inactivity." However, as to other
11 symptoms Mr. Marshall testified to such as Ms. Marshall's irritability, mood swings and
12 threatening behavior, the ALJ did not discuss whether he was accepting or rejecting them.

13 Mr. Marshall's testimony regarding his wife's symptoms was competent evidence which
14 the ALJ was required to take into account. If it was the ALJ's intent to accept Mr. Marshall's
15 testimony about irritability, mood swings and threatening behavior, the ALJ erred because his
16 decision did not take into account all of the symptoms. On the other hand, if it was the ALJ's
17 intent to reject all of Mr. Marshall's testimony about his wife's symptoms, the ALJ erred by
18 failing to give specific germane reasons for so doing. These errors were not harmless.
19 Combined with Dr. Parker's opinions, the Court cannot confidently say no reasonable ALJ, when
20 not making the same error as the ALJ, could have reached a different disability determination.
21 On remand, the ALJ should reevaluate the testimony of Mr. Marshall.

22 **D. Adequate development of the record**

23 The ALJ gave great weight to the opinions of examining doctor Wayne Dees, Psy.D., and
several reviewing DDS doctors. Tr. 17-18. Ms. Marshall argues the ALJ erred by failing to

1 obtain all of Ms. Marshall's DSHS records for these doctors to consider in rendering their
2 opinions. Dkt. 12 at 13. The Commissioner does not dispute Ms. Marshall's contention that the
3 DSHS records were not provided. The Commissioner, however, argues the ALJ had no duty to
4 supplement the record because the reports of Dr. Dees and the reviewing doctors were not
5 ambiguous, and Dr. Dees performed his own evaluation that was valid notwithstanding the fact
6 he lacked all of Ms. Marshall's records. Dkt. 14 at 16-18. These arguments fail to address an
7 ALJ's duty to supplement the record when a medical source's report "does not contain all the
8 necessary information" as is obviously the case here.⁴ The function of a reviewing doctor is to
9 render an opinion based on a review of all relevant medical evidence. A non-treating examining
10 doctor renders an opinion after examining a claimant just once. As such, a review of the
11 claimant's medical records is an inherent part of a non-treating examining doctor's evaluation.
12 In this case for instance, Dr. Dees's evaluation noted the records he reviewed and summarized
13 Ms. Marshall's medical history based in part on those records. Tr. 227-28. Hence, one would be
14 hard pressed to justify reliance on a reviewing or examining doctor's report that was prepared
15 without the benefit of all relevant medical records.

16 Accordingly, the Court concludes the ALJ erred in failing to provide Dr. Dees and the
17 examining doctors all of Ms. Marshall's medical records. On remand, if the ALJ seeks to rely on
18 the opinions of an examining or reviewing doctor, the ALJ should ensure that those opinions are
19 based on all the necessary information, including all relevant medical records.

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21 ⁴ See 20 C.F.R. § 404.1512(e)(1) (providing that when evidence received from medical source is
22 inadequate to determine whether a claimant is disabled, that source will be re-contacted to seek
23 additional evidence or clarification, but only when that source's report "contains a conflict or
ambiguity that must be resolved, . . . does not contain all the necessary information, or does not
appear to be based on medically acceptable clinical and laboratory diagnostic techniques"); see
also 20 C.F.R. § 416.912(e)(1).

1 **D. The ALJ's residual functional capacity assessment**

2 As discussed above, the ALJ's errors noted above require the matter be remanded for
3 further proceedings. Accordingly, on remand, after properly evaluating the medical evidence,
4 the ALJ should also reevaluate Ms. Marshall's RFC, and as appropriate incorporate all functional
5 limitations in any hypothetical question posed to a vocational expert.

6 **CONCLUSION**

7 For the foregoing reasons, the Court recommends the Commissioner's decision be
8 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,
9 the ALJ should (1) reevaluate the medical opinions of Dr. Parker; (2) reevaluate Mr. Melvin
10 Marshall's lay testimony; (3) if the ALJ seeks to rely on the opinions of an examining or
11 reviewing doctor, the ALJ should ensure that those opinions are based on all the necessary
12 information, including all relevant medical records; and (4) and reevaluate, as necessary, Ms.
13 Marshall's RFC before proceeding to steps four and five. A proposed order accompanies this
14 Report and Recommendation.

15 Objections, if any to this Report and Recommendation must be filed and served no later
16 than **May 29, 2012**. If no objections are filed, the matter will be ready for the Court's
17 consideration on **June 1, 2012**. If objections are filed, any response is due within 14 days after
18 being served with the objections. A party filing an objection must note the matter for the Court's
19 consideration 14 days from the date the objection is filed and served. Responses to objections
20 must be filed no later than 14 days after being served with objections. Objections and responses

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1 shall not exceed twelve pages. The failure to timely object may affect the right to appeal.

2 DATED this 15th day of May, 2012.

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5 BRIAN A. TSUCHIDA
6 United States Magistrate Judge
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